

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 12 2006

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

OSCAR G. LEYVA-FRANCO,

Defendant - Appellee.

No. 04-10430

D.C. No. CR-01-00518-1-RCC

MEMORANDUM*

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Submitted August 11, 2005**
San Francisco, California

Before: PREGERSON, KLEINFELD, and HAWKINS, Circuit Judges.

Defendant-Appellee Oscar Guadalupe Leyva-Franco entered into a plea agreement and pled guilty to violating 21 U.S.C. §§ 952(a), 960(a)(1), and 960(b)(1)(B)(ii). At sentencing, the district court granted Leyva-Franco a two-level “safety valve” reduction, a three-level acceptance of responsibility reduction, and a

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

two-level role reduction. In addition, over the government's objection, the district court granted Leyva-Franco a four-level downward departure for aberrant behavior. The district court imposed a sentence of 48 months in prison, followed by 60 months of supervised release. Leyva-Franco was released by the Bureau of Prisons after serving 48 months in prison. Following release, Leyva-Franco lost his resident alien status and was deported to Mexico on September 11, 2004.

The government again appeals the district court's four-level departure for aberrant behavior in sentencing Leyva-Franco. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Section 5K2.20 of the United States Sentencing Guidelines Manual permits a district court to depart downward in sentencing if the defendant's conduct was based on aberrant behavior. "[P]rior to departing downward for aberrant behavior under § 5K2.20, a sentencing court must find both that the case is extraordinary and that the behavior was aberrant under the three-factor test." *United States v. Guerrero*, 333 F.3d 1078, 1082 (9th Cir. 2003). In this case, the district court explained why Leyva-Franco's conduct was exceptional or extraordinary. The district court determined that Leyva-Franco's conduct was a single criminal occurrence that was committed without significant planning, was of limited duration, and represented a marked deviation by Leyva-Franco from an otherwise law-abiding life. Accordingly, we hold that the

district court did not abuse its discretion in granting Leyva-Franco a downward departure for aberrant behavior under § 5K2.20, or in the extent of its departure, and that the resulting sentence was not unreasonable. *See United States v. Menyweather*, – F.3d –, 2005 WL 3440800, at * 4, 7-8 (9th Cir. Dec. 16, 2005).

The Sentencing Guidelines are now advisory. *See United States v. Ameline*, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc). Assuming without deciding that the government could seek a limited remand under *Ameline*, such a remand is unnecessary in this case. *See id.* at 1083 (“[T]he limited remand is invoked only when it cannot be determined from the record whether the judge would have imposed a materially different sentence had he known that the Guidelines are advisory rather than mandatory.”).

AFFIRMED.